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In The

Supreme Court of the United States

October Term, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

Under Respondents' interpretation of Title IV-D and § 1983, each of the 18 million custodial parents in the United States is entitled to sue State officials to enforce every statutory and regulatory provision of Title IV-D. This is a breathtaking proposition. Respondents concede it is not supported by any express right to a private cause of action under Title IV-D. Resp. Br. 8 ("Title IV-D does not provide for private enforcement at all"). Instead, Respondents depend upon implied rights under the Social Security Act that, in turn, depend upon a presumption that § 1983 imposes broad liability upon States absent clear evidence in the underlying statute that Congress meant to limit or eliminate State liability. Of course, this approach conflicts directly with this Court's holdings that under Spending Clause statutes, States only accept the consequences (such as private enforcement actions) that are expressly provided for in the legislation creating the grant program.

To be sure, the Court could decide this case solely on the basis that Title IV-D simply does not unambiguously confer any enforceable rights upon Respondents and that the Secretary's remedies evidence congressional intent to preclude private enforcement. This case, however, provides the Court with the vehicle for providing much needed clarity concerning the proper interpretation of § 1983 as it applies to Spending Clause legislation.

The Court's 16-year struggle since it issued *Maine v. Thiboutot*, 448 U.S. 1 (1980), to develop a coherent body of law that reasonably guides lower courts in deciding what statutory "rights" are protected by § 1983 justifies a reevaluation of that statute's scope. The Court should restrict § 1983 to the enforcement of federal statutes that contain an unequivocally expressed private cause of action within them and should stop presuming that federal laws may be enforced against the States and their officers, even where those laws would not be enforced against private defendants. Alternatively, the Court should restrict § 1983 to the enforcement

of those constitutional and statutory rights that are based on Congress' exercise of authority under § 5 of the Fourteenth Amendment. Only in this way can the Court properly respect the States' sovereignty interests in not being subjected to endless litigation concerning which federal statutory rights and implementing regulations can be enforced privately. And only in this way can Congress reassume responsibility for deciding expressly when States must accept private causes of action as a condition of receiving federal funds under Spending Clause programs.

I. TITLE IV-D DOES NOT CREATE ENFORCEABLE RIGHTS IN RESPONDENTS.

1. Section 1983 is procedural, not substantive. It creates no rights itself, but merely enforces rights created elsewhere. Respondents lose sight of this distinction by focusing on the words "laws" and "secure" and thereby ignoring the critical question that *Wright*, *Wilder*, and *Suter* pose: whether Title IV-D creates a "right" that Respondents may enforce via § 1983.

Contrary to Respondents' assertion, Petitioner does not maintain that Congress must specifically authorize a private enforcement action in a statute before § 1983 is available as a remedy. Resp. Br. 11, 42. Rather, Petitioner maintains that for Congress to create a right in Respondents, it must use "unambiguously" clear language to this effect in Title IV-D. *Suter v. Artist M.*, 503 U.S. 347, 356 (1992). Demanding a clear statement from Congress satisfies at least two vital requirements: (1) it gives participating States the requisite notice that the statute includes rights enforceable by private parties and that being subject to suits to enforce such rights is therefore a condition of accepting Title IV-A and IV-D funds, *see Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("*Pennhurst I*"), and (2) it reduces the separation of powers concerns that are inherent whenever courts are asked to divine Congress' intent concerning a subject that Congress

has never explicitly addressed. Federal courts currently are left to decide whether "rights" enforceable under § 1983 exist in other federal statutes, and in doing so they create quasi-implied causes of action under such statutes. *See* Pet. Br. 11.

The fact that the Secretary – the person most closely associated with Title IV-D – has changed her position with respect to whether Title IV-D creates rights enforceable by § 1983 (S.G. Br. 17 n.18) speaks volumes as to how "unambiguous" any "right" asserted by Respondents really is. Although the Solicitor General maintains that the 1988 and later amendments caused the Secretary to change her position (*id.*), it is unclear which aspects of those amendments supposedly caused this sudden "change." Indeed, as recently as 1990, the Secretary's position in this Court was that Title IV-D did *not* create enforceable rights in private individuals. *See Brown v. Ledbetter* (U.S. No. 89-1030), U.S. Br. in Opp. 10-11 (filed Feb. 1990) (Title IV-D "and its implementing regulations do not envision a program creating enforceable rights to services in specific individuals"); *id.* at 11 n.12 (Title IV-D's "comprehensive oversight and enforcement scheme demonstrates that Congress intended to foreclose private enforcement of its requirements through actions under Section 1983"); *id.* at 12 n.12 ("Congress did not intend that state compliance with federal requirements for operation of child support enforcement programs would be policed through private suits by recipients under Section 1983").[1]

The question remains whether Title IV-D unambiguously confers any enforceable rights in favor of Respondents. Respondents assert initially that Title IV-D "assures every child the 'right to support, inheritance, and to know who his father is.' " Resp. Br. 1 (quoting S. Rep. No. 1356, 93d Cong., 2d Sess. 51 (1974)). These are certainly worthy sentiments,

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[1] As evidenced by the *amicus* brief filed by 46 States and Territories, the other parties to the federal-state agreement have always understood Title IV-D to be enforceable only by the Secretary and not by private parties. *See* Illinois *Amicus* Brief.

but they are found only in background materials and they do not rise to the level of enforceable "rights" under § 1983. *See Pennhurst I*, 451 U.S. at 13 (holding that a statutory "bill of rights" in the Developmentally Disabled Assistance and Bill of Rights Act was not enforceable under § 1983). "It is simply a general statement of 'findings' and, as such, is too thin a reed to support the rights and obligations read into it" by Respondents. *Id.* at 19.

Yet even though the "right to support, inheritance, and to know who [the child's] father is" is not enforceable under § 1983, that, at bottom, is clearly the "right" that Respondents seek to have vindicated. Respondents want money and they want paternity established; in short, they want results. If participating States were obligated to secure support and establish paternity for each Title IV-D applicant as a condition of receiving federal funds, Respondents might have a claim against Petitioner. But Title IV-D does *not* require participating States to guarantee success. As a consequence, winning this case will not assure any Respondent any more money in hand or the establishment of paternity. Respondents do not and cannot deny that their injuries of lack of child support were caused by the noncustodial parents, not Petitioner. Pet. Br. 16, 18-19. Accordingly, such injuries are not redressable in this suit against Petitioner.

Alternatively, Respondents and the United States assert that Title IV-D creates a right of individuals to receive enforcement *services* from the State. Resp. Br. 22-25; S.G. Br. 10, 17-18. According to Respondents, Title IV-D guarantees that each participating State will provide the entire litany of enforcement services, such as those found in 42 U.S.C. § 666, to the letter 100% of the time to 100% of eligible applicants. Thus, according to Respondents, each IV-D applicant may sue under § 1983 if the State fails to perform any one of the hundreds of possible actions involved in providing services over the potential course of more than 20 years.

This is an astonishing proposition with ominous implications. It means that anytime an individual is dissatisfied with an aspect of child support and alleges that the State has not delivered just *one* of the many enforcement services required by Title IV-D, that individual may sue the State's Director of Child Support Enforcement under § 1983 to obtain, at a minimum, an injunction and attorneys' fees (under 42 U.S.C. § 1988). Yet Respondents and their *amici* can point to *no* State that provides 100% of the services 100% of the time, because this is impossible. *See* American Public Welfare Association *Amicus* Br. 5 (noting that the national child support collection rate is only 18 percent because "at every step in this complex and massive program, States run into any number of external variables that are outside their control, yet can drive the outcome and, in some cases, make enforcement impossible"); *see also id.* 5-16 (identifying a sampling of the real-world, practical problems that child support enforcement programs face daily). Thus, the financial and administrative burdens that flow from Respondents' assertion that 18 million individuals have the right to enforce Title IV-D in court are staggering. Indeed, as the Secretary informed the Eleventh Circuit, "[a] guarantee . . . of the full range of . . . child support enforcement services their individual cases might warrant would bankrupt IV-D agencies across the country." *Brown v. Ledbetter* (11th Cir. No. 87-8345), Brief for Federal Appellee (filed Nov. 1987) (a copy of which is being lodged with the Clerk).[2]

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[2] Even the United States disagrees with the full extent of Respondents' sweeping 100% provision of services contention, because it admits that States have a certain amount of prosecutorial discretion. S.G. Br. 10 ("Congress preserved state discretion in some areas, such as selecting appropriate collection tools and initiating judicial proceedings"). Yet even that modified position is unworkable, because without a clear statement of which provisions are enforceable and which are not, States will face burdensome lawsuits in cases that may ultimately be dismissed on prosecutorial discretion grounds.

In light of Title IV-D's scope, complexity, and interstate aspects, Congress explicitly directed that the *Secretary*, not individuals or the judiciary, would provide the enforcement necessary to insure compliance through a detailed system of audits, penalties, and incentive payments. See 42 U.S.C. § 652; Pet. Br. 20-23. Congress' decision to vest exclusive oversight of the Title IV-D program in the Secretary was perfectly reasonable, given that (i) the federal government's money is involved, (ii) Congress has provided the Secretary with the resources to develop an expertise in this complicated field that no federal court can match, and (iii) enforcement by private parties instead of by a central authority could lead to inconsistent results (as evidenced by the conflicts in the lower courts). The Secretary's oversight of each State's program insures that the requirements imposed upon States to provide Title IV-D services are not a "dead letter" without a private cause of action. *See Suter*, 503 U.S. at 360-61; Pet. Br. 20-23. The Secretary enforces the "contract" between participating States and the federal government.[3]

Petitioner shares Respondents' concern for children. She recognizes the need for a quality child support enforcement program, and indeed she – along with thousands of other devoted public servants in Arizona – has dedicated her talents and energies to helping Respondents and others in need of

[3] Thus, the results reached in *Bell v. New Jersey*, 461 U.S. 773 (1983), and *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), support Petitioner, not Respondents. Resp. Br. 12-13 n.12. Both cases concerned the *federal* government's recovery of funds that States had spent in an inappropriate manner. Moreover, this Court determined that the plain language of both statutes at issue authorized the suit and thereby provided the clarity that *Pennhurst I* requires. *See Bell*, 461 U.S. at 790 n.17; *Bennett*, 470 U.S. at 665-66. *United States v. Texas*, 507 U.S. 529, 538 n.6 (1993), which concerned the *federal* government's ability to seek the traditionally available remedy of prejudgment interest on debts owed by a State under the terms of a federal grant agreement, is similarly inapposite.

such governmental services.[4] Nevertheless, there simply are not enough resources available for government to do everything for everyone every time. Indeed, even if a court ordered Petitioner to divert to the Title IV-D program all of the resources her agency has to provide other critically important services – including those involving adoption, child care, child protection, developmental disability, elder abuse, and food stamps – she still would not be able to satisfy every Title IV-D recipient completely.

2. Contrary to Respondents' claim, "substantial compliance" continues to play a vital role in Title IV-D, and it undercuts any argument that Title IV-D provides privately enforceable "rights." It is common ground that "substantial compliance" was the touchstone for compliance before Congress passed the 1996 amendments to Title IV-D.[5] Resp. Br. 16-17 (noting that 42 U.S.C. § 602(a)(27)'s recitation of "substantial compliance" has been superseded by the 1996 Act, while acknowledging that the term still appears in two other places); S.G. Br. 5-6 & n.6 (the Secretary has interpreted "substantial compliance" to mean "75% compliance for most . . . program functions"). "Substantial compliance" still has a significant place under the 1996 Act.

All parties agree that, under the 1996 Act, the Secretary's penalty provisions remain the same and are still tied to whether a State "complie[s] substantially" with Title IV-D's

[4] Arizona's commitment to Title IV-D is paying off: during the last four years Arizona has doubled its child support collections (one of only four States to do so; *see* U.S. Department of Health & Human Services News Release (Oct. 23, 1996)), obtained federal certification of its automation program (one of only six States to do so; *see Child Support Report* (U.S. Dep't Health & Human Services), Oct. 1996 at 6.), and won various national and regional awards. *See* Cert. Reply 2-3, n.1.

[5] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105-2355 ("the 1996 Act").

requirements.[6] See 110 Stat. 2145-46 (to be codified at 42 U.S.C. § 609(a)(8)). States still have to comply with certain support establishment and enforcement requirements 75% of the time. A State's IV-D program *as a whole* must comply with the requirements imposed by Congress and the Secretary. Even the United States concedes that this system-wide requirement is enforceable only by the Secretary, not by individuals such as Respondents. S.G. Br. 20. Yet that is precisely what Respondents' Complaint seeks – a judicial order that Arizona "achieve as well as sustain substantial compliance with federal law, *throughout all programmatic operations* at issue." J.A. 42 (emphasis added).[7]

Finally, Respondents and the Solicitor General misconstrue Petitioner's argument regarding "substantial compliance." Petitioner does not suggest that any participating State can simply ignore one-quarter of its case load. Petitioner recognizes that the statute and its implementing regulations require the State to attempt in good faith to provide services to all eligible applicants. But that does not mean that the State must succeed in providing every individual service to every individual recipient every time, or that the failure to do so warrants judicial intervention by way of a structural injunction. Rather, under the detailed system that Congress designed, a State's performance is to be judged only at the

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[6] Congress originally required "full compliance" by the States, but reduced the standard to "substantial compliance" in 1984. *See* Ill. *Amicus* Br. 13 n.8, 14. To date, the Secretary has found "the use of a 75 percent standard [to be] both rigorous and reasonable." 50 Fed. Reg. 40121 (1985). The definition of what constitutes "substantial compliance" may change under the Secretary's forthcoming regulations, S.G. Br. 9 n.10, but that does not alter the fact that "substantial compliance" remains the touchstone.

[7] Because the Secretary's last audit of Arizona's Title IV-D program revealed in 1994 that the State has in fact "*achieved* substantial compliance," Cert. Reply App. 1 (emphasis added), that portion of the case is moot. All that remains is Respondents' request for an injunction requiring Arizona to "sustain" substantial compliance.

system-wide level, only on the basis of "substantial compliance," and, most importantly, only by the Secretary. In sum, Title IV-D simply does not confer any enforceable right upon any individual applicant that would permit suit to be filed under § 1983.

3. This Court's decisions delineating the nature of state-federal relations with respect to Spending Clause legislation seriously undermine the argument that Title IV-D can be enforced privately. Federal-state agreements concerning cooperative programs established pursuant to Congress' spending power are contractual in nature. *See, e.g., Pennhurst I*, 451 U.S. at 17 (the "legitimacy of Congress' power to legislate under the spending power [ ] rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' "); *see also South Dakota v. Dole*, 483 U.S. 203, 207 (1987). The validity of a contract between two sovereigns requires, as this Court has insisted, that Congress identify all terms and conditions placed upon Spending Clause grants "unambiguously" and with a "clear voice" so that States can exercise their choice whether to accept the grant and implement the cooperative program " 'knowingly, cognizant of the *consequences* of their participation.' " *Id.* (emphasis added) (quoting *Pennhurst I*, 451 U.S. at 17). Respondents tacitly agree that the contract analysis is applicable by observing that in "docking states not meeting the IV-D obligations contained in their IV-A grants, Congress is in effect recouping *liquidated damages* for welfare costs that could have been avoided." Resp. Br. 17 n.18 (emphasis added).[8]

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[8] The requirement that Congress "unambiguously" set forth the conditions that it attaches to federal funds is not simply grounded in the basic tenets of contract law, but is also based on certain constitutional considerations. The first consideration – federalism – arises from the fact that the Title IV-D program is a contract entered into by two sovereigns. As such, the mechanism for enforcing the contract's provisions has the potential to expose the State to actions in federal court and thus raises Eleventh Amendment concerns. *See Seminole Tribe*, 116 S. Ct. 1114, 1122 (1996) ("[i]t is inherent in the nature of sovereignty not to be amenable to

Contrary to Respondents' assertion, the consequences of the States' participation were not limited to the requirements that the States comply with Title IV-D and that they have their compliance measured in a particular manner. Being subject to suit by millions of private individuals was certainly a consequence that the States were also entitled to weigh before deciding whether to take part. However, because rights enforceable under § 1983 are currently identified on a provision-by-provision basis by courts rather than by Congress, the States did not receive the notice that *Pennhurst I* requires concerning the rights, if any, that individuals could privately enforce under Title IV-D. *See Pennhurst I*, 451 U.S. at 17.

Respondents take pains to emphasize the comprehensive and precise nature of Title IV-D. *See*, *e.g.*, Resp. Br. 9 ("painstakingly developed"), 15 ("exacting, concrete detail"). Surely, amidst all of the elements of Title IV-D's detailed remedial scheme – audits, financial incentives, and financial penalties – Congress did not simply "forget" to include private enforcement remedies. *See Seminole Tribe*, 116 S. Ct. at 1132 ("where Congress has provided a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*").

Congress identified only one set of consequences in Title IV-D: that the Secretary would impose a financial penalty upon States that failed the Secretary's audits for substantial compliance with Title IV-D's requirements. 42 U.S.C. § 609.

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the suit of an individual without its consent") (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

The second consideration arises from the doctrine of separation of powers. The Constitution gives Congress the exclusive power to determine the conditions that attach to federal grants and the jurisdiction of Article III courts. It is thus axiomatic that neither of the other two coordinate branches of the federal government has the power to change the terms of a Spending Clause agreement into which a State and Congress have entered.

States accepted the Title IV-A and Title IV-D funds after recognizing that (i) Congress also gave the Secretary discretion to suspend imposition of the penalty to allow a 'failing' State to achieve compliance; (ii) the "draconian" penalty of funds cut-offs would probably be reserved for the most egregious violations; (iii) the States still had political methods to persuade the Secretary to suspend or reduce penalties; (iv) compliance could be satisfied at a 75% rate; and (v) most importantly – *no other consequences existed.* It would be inappropriate to allow nonparties to the agreement (such as Respondents) to step in after the fact and demand sanctions in excess of those to which the contracting parties agreed.

II. THIS COURT SHOULD RECONSIDER *THIBOUTOT*.

1. In the 16 years since this Court decided *Thiboutot*, it has used two fundamentally inconsistent approaches to determining on an ad hoc basis whether a federal statute provides rights enforceable under § 1983. On one hand, in *Pennhurst I* this Court held that in Spending Clause legislation the conditions placed upon the States' receipt of federal grant funds (such as the amenability of States to private lawsuits to enforce federal rights) must be explicit. The Court reinforced the specificity requirement in *Suter* by mandating that Congress unambiguously confer any private rights. Thus, there can be *no* private enforcement absent an unambiguously clear statement by Congress authorizing such actions.

On the other hand, in *Wright* and *Wilder* a majority of the Court adopted a position much less favorable to the States. Under those decisions, courts may presume that § 1983 provides a basis for relief whenever the underlying federal law provides an entitlement that the court is comfortable in labeling as a "right." Thus, Respondents' rejoinder (Resp. Br. 35) that *Thiboutot* has generated only ten decisions by this Court wholly ignores the real, fundamental problem – the Court's two distinct lines of authority effectively permit lower courts

to choose the outcome in a case based on result rather than principle.

Predictably, this has led, as the petition and opening brief demonstrated, to a dizzying array of conflicting lower court opinions. *See*, *e.g.*, Pet. Br. App. C. Thus, Respondents' assertion that *Thiboutot* has not generated excessive work for this Court completely misses the point. *Thiboutot* has spawned extraordinary confusion, caused inordinate resources to be expended on the threshold provision-by-provision determination of the States' amenability to suit, and, in the process, caused severe damage both to State sovereignty and to separation of powers principles. Sixteen years of legal chaos is enough. The time has come to clarify § 1983.

2. Respondents and their *amici* misapprehend the import of *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), as it relates to the viability of the expansive interpretation of § 1983 first announced[9] in *Thiboutot*. On the basis of *Seminole Tribe*, § 1983 should not be construed to permit Respondents' suit against Arizona or any of its officers because Congress (1) enacted Title IV-D pursuant to its Article I spending power rather than its Fourteenth Amendment powers and (2) specifically identified the remedial scheme that if intended Title IV-D to include.[10]

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[9] Respondents' assertion (Resp. Br. 28) that *Thiboutot* did not break new ground is simply wrong. *See Suter v. Artist M.*, 503 U.S. 347, 355 (1992) ("first established" in *Thiboutot*).

[10] Respondents and the United States are incorrect in arguing that Petitioner's *Thiboutot* and Eleventh Amendment arguments were outside the scope of her petition for *certiorari*. *See* Resp. Br. 28-30, 44 n.3; S.G. Br. 11 n.11. This Court considers a question presented "to comprise every subsidiary question fairly included therein." S. Ct. R. 14.1(a). The modification of *Thiboutot* inheres in the question presented. In fact, Respondents understood in their opposition to the Petition that the Petition "loudly" disclosed the intent to limit cases like *Thiboutot*. Resp. Br. in Opp. 8. *See also* Pet. Br. 7 (stating that "[t]he time has come for the Court to decide the general availability of § 1983 to enforce federal nonconstitutional rights" as a reason to grant the petition). (Fn Continues)

Thiboutot's expansive construction of § 1983 is not viable in light of *Seminole Tribe*. Under *Thiboutot*, § 1983 creates a cause of action to enforce *any* federal right, whether arising out of the Constitution, a statute, or even an administrative regulation, and whether related to equal rights or not. According to Respondents, as long as some federal "law" creates a "right," § 1983 provides the remedy. Resp. Br. 10, 25. *Seminole Tribe* counsels that "laws" should be interpreted narrowly, in a manner that is more respectful of the States.

The Court's *Seminole Tribe* decision, which provides that courts should not imply remedial schemes against the States beyond those that Congress expressly provides in the rights-creating statute, establishes a basis for reexamining the *Thiboutot* decision. The Fourteenth Amendment allows Congress to act directly against the States. But generic use of § 1983 to enforce any federal "law" unrelated to the Fourteenth Amendment – such as Article I Spending Clause legislation like Title IV-D – carries grave consequences. For example, it relieves Congress of its obligation to make decisions for which it can be held accountable. In addition, it creates an inference that "without judicial enforceability, the States cannot be trusted to implement [statutory schemes]." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 528 (1990) (Rehnquist, C.J., dissenting). Also, it transfers the resolution

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(Fn Continued) Moreover, this Court has overruled decisions "of many years' standing although the parties did not urge such a holding in their briefs." *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 320-21 n.6 (1971). Indeed, in the context of § 1983, the Court in *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 663 (1978), overruled a portion of *Monroe v. Pape*, 365 U.S. 167 (1961), even though Petitioners there made clear that they sought "no such rejection of *Monroe*" and did not take issue with *Monroe's* "correctness." *Monell* Pet. Br. 33 (No. 75-1914, filed May 11, 1977); *Monell* Pet. Reply Br. 1 (filed Oct. 28, 1977). Here, by contrast, Petitioner's *Thiboutot* arguments are explicit and fully briefed. Similarly, the issue is fully addressed by Respondents and the United States.

of social ills to the judiciary, an institution that is neither designed for nor capable of providing such resolution. *See Missouri v. Jenkins*, 115 S. Ct. 2038, 2060-61 (1995) (O'Connor, J., concurring).

In addition to these profound consequences, *Thiboutot* engenders the federalism and separations of powers problems inherent in permitting federal courts to run State programs. All of these concerns call for this Court to review *Thiboutot* in light of *Seminole Tribe*. This Court should particularly address the level of clarity that a federal statute must provide before a federal court may enforce federal law against a State officer and exercise equitable powers to manage a State program.

If this Court's clear statement principles were applied to § 1983 actions, those actions would no longer serve as convenient vehicles for hauling State officials into federal court whenever a beneficiary of a federal statutory program was dissatisfied with the way a State was administering his or her case in a federal grant program. Instead, Congress would be forced to include a private right of action against the States and State officials within the Spending Clause legislation. This interpretation of § 1983 would return to Congress its institutionally proper role of deciding expressly when States can be sued rather than leaving the issue up to the judiciary to decide on ad hoc, case-by-case, and provision-by-provision analyses.

Petitioner has offered two alternative ways in which the Court could re-interpret § 1983. Restricting § 1983 to constitutional rights and civil rights laws would be most in keeping with *Seminole Tribe*'s holding and § 1983's Fourteenth Amendment roots. Pet. Br. 37-43. Alternatively, the Court could extend § 1983 beyond civil rights matters in nonconstitutional cases, but only to those cases in which the underlying statute contains an unambiguously conferred private right

of action. Pet. Br. 32-36. Such an interpretation would diminish some of the gross inconsistencies that *Thiboutot's* construction of § 1983 engenders: (i) it would accord proper weight to § 1983's protection of only those "rights" that are "secured" by law to an individual; (ii) it would bring § 1983 in line with the Court's post-*Thiboutot* emphasis on clear statement principles; and (iii) it would eliminate the existing anomaly that makes it easier to sue a State official under § 1983 than to sue a private individual through an implied cause of action, even though both causes of action hinge on an investigation into Congress' intent to create an enforceable right.

3. Respondents are incorrect in their assertion that Congress has ratified *Thiboutot's* construction of § 1983. *See* Resp. Br. 11 & n.11, 31-33. Since *Thiboutot*, Congress has not reenacted § 1983 or enacted any other legislation directly relevant to it.[11] Congressional *inaction* with respect to expressly overturning the *Thiboutot* decision provides no basis for a claim of *ratification*. The Court has long recognized that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946); *see also James v. United States*, 366 U.S. 213, 220-21 (1961).

Further, ratification by implication is as disfavored as repeal by implication. Thus, it is difficult to infer "ratification" where, as here, the set of unpassed bills that Respondents cited involved significantly more than the *Thiboutot* question. In fact, these bills presented four distinct and independently contentious issues.[12] Rather than representing a

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[11] In fact, the most recent amendment to § 1983 came in 1979, when Congress enlarged the scope of coverage to expressly include officials of the District of Columbia. Pub. L. No. 96-170, § 1, 93 Stat. 1284.

[12] These issues included: (1) the magnitude of civil rights claims after *Monell*, *Owen v. City of Independence*, 445 U.S. 622 (1980), and *Thiboutot*; (2) *Owen* and the need for derivative governmental immunity; (3) the availability of attorneys' fees under 42 U.S.C. § 1988; and (4)

carte blanche acceptance of *Thiboutot*, Congress' failure to reach agreement might reflect an unwillingness to overrule *Owen*, *Monell*, or the Civil Rights Attorney's Fees Act of 1976. *See United States v. Wise*, 370 U.S. 405, 411 (1962) ("[l]ogically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment").

Respondents are equally incorrect in contending (Resp. Br. 32-33) that Congress intended to ratify *Thiboutot* when it amended the amount-in-controversy limitation of 28 U.S.C. § 1331. Respondents' careful parsing of one sentence in a Senate Report does not constitute convincing evidence that Congress "*explicitly* adopt[ed]" *Thiboutot* when it eliminated the amount-in-controversy requirement. *See Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991) (emphasis added). Congress never mentioned *Thiboutot* in any of the relevant legislative history.[13] Conversely, Congress explicitly discussed the Supreme Court holdings that it intended the amendment to reflect.[14] The notion that Congress ratified *Thiboutot* by carefully *omitting* any reference to it when amending § 1331 is simply untenable.

Thiboutot and the possible limitation of § 1983 to civil rights laws. *See, e.g.*, 127 Cong. Rec. S1625 (daily ed. Feb. 26, 1981) (statement of Sen. Hatch on S. 3114 and S. 3115); 126 Cong. Rec. S12562-63 (daily ed. Sept. 15, 1980); 131 Cong. Rec. S1322-23 (daily ed. Feb. 7, 1985) (statement of Sen. Hatch on S. 436); 133 Cong. Rec. S922-23 (daily ed. Jan. 20, 1987) (statement of Sen. Hatch on S. 325); *Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 97th Cong. 112-39 (1981) ("1981 Hearings") (attachment 1 to the prepared statement of National Institute of Municipal Law Offices).

[13] The citation to *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), in a Senate report footnote cannot bear the weight Respondents ascribe to it. *See* Resp. Br. 32. The footnote contains no parenthetical or other explanation to reveal the Senate's rationale for citing it. Such evidence can hardly lead to the conclusion that the Senate was affirmatively ratifying *Chapman*, let alone *Thiboutot*.

[14] *See, e.g.*, S. Rep. No. 96-827, at 5 n.9 (1980) (discussing *Monell*).

Next, Respondents claim that Congress ratified *Thiboutot* by enacting 42 U.S.C. §§ 1320a-2 and 1320a-10 in response to *Suter v. Artist M.*, 503 U.S. 347 (1992). The intended effect of those statutes is impossible to discern. *See* Pet. Br. 14 n.4, 48 & n.29. Moreover, their legislative history demonstrates that Congress was hotly divided and confused over the "*Suter* issue." *See* 140 Cong. Rec. S15024 (daily ed. Oct. 8, 1994). In fact, the only point upon which Congress *could* agree was that *Suter*'s actual holding was correct. *See* Pet. Br. 48 n.29. Unable to find any clarity or coherence in the "grounds" that existed pre-*Suter*, Congress could not discern which of *Suter*'s "grounds" were objectionable.[15] Thus, Congress passed an amendment that had little or no coherence. The *Suter* amendment's incomprehensible language makes it a "poor beacon to follow in discerning the proper" scope of § 1983. *Zuber v. Allen*, 396 U.S. 168, 185 n.5 (1969). It therefore sheds no light on *Thiboutot*. Moreover, it reflects just how futile it is for anyone to try to make sense of the cases post-*Thiboutot*, and thus reinforces the need for this Court to revisit the issue.

4. This Court has recognized that because the creation of causes of action is a quintessentially legislative function, it should not imply a cause of action in a statute that does not explicitly include one in the absence of some other clear expression of congressional intent. *See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979) (refusing to imply a private cause of action for damages where Congress' express methods for enforcing the act in question made it "highly improbable that Congress absent-mindedly forgot to mention an intended private action") (citation and internal quotations omitted). *Thiboutot*'s presumption that a cause of action exists under § 1983 to vindicate federal

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[15] *See, e.g., Hearing Before the Subcommittee on Social Security and Family Policy of the Senate Committee on Finance*, 102d Cong., 6, 15, 44-53 (1992).

statutory rights unless Congress expressly or implicitly provides to the contrary created a situation in which courts are permitted to exercise a legislative function with respect to the existence of enforceable rights. Pet. Br. 31. By creating this class of quasi-implied causes of action, the Court permitted Congress to abdicate its legislative responsibility for creating enforceable rights. This in turn made Congress less accountable and removed the decisionmaking process from the legislative arena in which States and parents could have a voice in defining the rights in question and the way in which the rights would be enforced. The presumption also invited the courts to exercise their equitable powers to run state programs, creating the risk of divesting the Secretary of the ability to craft administrative solutions using her expertise in this area and of depriving the States of the ability to control and manage their own budgets.

Leaving the identification of enforceable rights to the courts also violates principles relating to federalism, separation of powers, and the States' right to receive clear notice that a particular Spending Clause statute includes rights enforceable under § 1983 prior to agreeing to participate in a federal grant program. The Court's recent *Seminole Tribe* decision concerning *Ex parte Young* reflects yet another instance in which this Court has demanded a clear statement from Congress before altering the delicate federal-state balance and imposing additional liabilities on States and their officials. See Pet. Br. 29-30. Demanding such precision from Congress where federalism concerns are present is hardly unusual, even in the context of § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (stating that "Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States or if it intends to impose a condition on the grant of federal moneys") (internal quotations and citations omitted). The Court should once again demand this precision.

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Under this Court's "clear statement" precedents of *Pennhurst I* ("unambiguous" "clear voice"), *Will* ("unmistakably clear"), and *Suter* ("unambiguously confer"), the Court should reverse the Ninth Circuit's decision. Because of the confusion concerning § 1983 that the other line of decisions, such as *Thiboutot*, *Wright*, and *Wilder*, have engendered regarding enforceable rights under § 1983, this Court should also announce an objective test that can be applied in future cases so the laws that Congress enacts can be applied uniformly across the Nation. Courts must stop guessing and speculating as to whether Congress intended to create liability, and – when dealing with § 1983 – must stop *presuming* a sovereign State's liability based solely on Congress' silence as to whether enforceable rights exist.

CONCLUSION

For the foregoing reasons and those set forth in Petitioner's opening brief, this Court should reverse the court of appeals' judgment.

Respectfully submitted,

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